NO. 82029-5
consolidated with 82425-8

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD MUTCH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

APPELLANT'S REPLY TO STATE'S SUPPLEMENTAL BRIEF

NANCY P. COLLINS
DAVID L. DONNAN
Attorneys for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

1. THE COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED ON MUTCH'S MULTIPLE CONVICTIONS SHOULD BE SCRUTINIZED FOR THE DOUBLE JEOPARDY VIOLATION AT ITS ROOT 1

2. THE IMPOSITION OF MULTIPLE PUNISHMENTS BASED ON IDENTICALLY CHARGED OFFENSES WITHOUT A JURY FINDING THAT THE CONVICTIONS ARE SEPARATE AND DISTINCT VIOLATES DOUBLE JEOPARDY 9

a. The prosecution distorts the burden of showing a double jeopardy violation 9

b. The double jeopardy error is well-established, consistent with a litany of cases, and plainly evident from the record 12

c. The testimony and arguments do not rectify the double jeopardy violation 16

d. Mutch is not challenging jury instructions 17

3. THE COURT CONSIDERED AND IMPERMISSIBLY REJECTED MUTCH'S REQUEST TO TREAT THE OFFENSES AS THE SAME CRIMINAL CONDUCT 18

4. THE STATE CONCEDES THE TRIAL COURT'S WRITTEN FINDINGS ARE INCORRECT, AND THUS REMAND IS REQUIRED 22

a. The prosecution properly agrees that the trial court misunderstood Mutch's offender score even though it imposed an exceptional sentence based solely on this misunderstanding of the offender score 22

b. The sentencing judge failed to engage in the mandatory analysis that substantial and compelling reasons justified the exceptional sentence 24

c. The procedures set forth in RCW 9.94A.537 apply to any exceptional sentence above the standard range 25

B. CONCLUSION 27

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Personal Restraint of Francis, __ Wn.2d __, 242 P.3d 866 (2010) 2, 9

In re Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980)..... 3

In re Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002)).. 2

McNutt v. Delmore, 47 Wn.2d 563, 288 P.2d 848 (1955) 3

State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998) 10

State v. Barbiero, 121 Wn.2d 48, 846 P.2d 519 (1993) 3, 4

State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006) 2, 3, 9

State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) 24

State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008). 11, 12, 17

State v. Noltie, 116 Wn.2d 831, 809 P.2d 1990 (1991) 13

State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997) 7, 23, 25

State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) 16

State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010) 3

State v. Vance, 168 Wn.2d 754, 230 P.3d 1055 (2010) 26

State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010).. 10

State v. Wilson, _ Wn.2d _, 2010 WL 5187735 (2010)..... 2

Washington Court of Appeals Decisions

State v. Berg, 147 Wn.App. 923, 198 P.3d 529 (2009).... 10, 12, 13, 14, 17

State v. Bickle, 153 Wn.App. 222, 234, 222 P.3d 113 (2009).....21

State v. Borsheim, 140 Wn.App. 357, 165 P.3d 417 (2007)... 13, 15

State v. Carter, 156 Wn.App. 561, 234 P.3d 275 (2010) 13, 17

State v. Corbett, _ Wn.App. _ , 242 P.3d 52 (2010) 11

State v. Ellis, 71 Wn.App. 400, 859 P.2d 632 (1993)..... 15

State v. Hayes, 81 Wn.App. 425, 914 P.2d 78, rev. denied, 130 Wn.2d 1013 (1996)..... 13

State v. Holland, 77 Wn.App. 420, 891 P.2d 49, rev. denied, 127 Wn.2d 1008 (1995)..... 14

State v. Jennings, 106 Wn.App. 532, 24 P.3d 430 (2001)..... 24

State v. Stockmyer, 136 Wn.App. 212, 148 P.3d 1077 (2006) 20

State v. Watkins, 136 Wn.App. 240, 148 P.3d 1112 (2006), rev. denied, 161 Wn.2d 1028 (2007)..... 13, 15

United States Supreme Court Decisions

Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) 3

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) 17

Magwood v. Patterson, __ U.S. __, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010) 5, 6

Federal Decisions

Johnson v. United States, 623 F.3d 41 (2nd Cir. 2010) 6

Statutes

Former RCW 9.94A.400 19

Former RCW 9.94A.560 5

RCW 10.73.100 2

RCW 9.94A.535 ..... 24, 25, 26

RCW 9.94A.537 ..... 25, 26

RCW 9A.44.010 16

Court Rules

RAP 1.2 7

RAP 2.5 7

Other Authorities

11 Wash. Practice, WPIC 3.01, Note on Use (3d. ed. 2008) 14

A. ARGUMENT.

1. THE COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED ON MUTCH'S MULTIPLE CONVICTIONS SHOULD BE SCRUTINIZED FOR THE DOUBLE JEOPARDY VIOLATION AT ITS ROOT

The prosecution distorts the nature of the double jeopardy error and Mutch's ability to obtain relief. The issues he raises are properly before this Court.

In July and November 2008, the trial court imposed an exceptional sentence for the first time in the course of this case, and this resentencing is jointly challenged in the present appeal. The sole aggravating factor for the exceptional sentence was that the multiplying effect of Mutch's five convictions for second degree rape left several of these offenses "unpunished" under the standard sentencing range.[1] On direct appeal, Mutch explains that he did not have five properly entered convictions for second degree rape, which undermines the predicate for the exceptional sentence. Those five convictions violate the double jeopardy clauses of the

[1] As discussed in Appellant's Opening Brief and Supplemental Brief, the trial court misapprehended the actual calculation of Mutch's offender score and overinflated the extent to which there were purportedly "unpunished" offenses.

state and federal constitutions, which prohibits multiple punishments absent jury findings of separate and distinct crimes.

The State contends that Mutch cannot raise this issue on direct appeal, because his direct appeal is from a re-sentencing proceeding. Yet a double jeopardy violation may be raised for the first time on appeal. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). It may be raised in a collateral attack, and may be asserted after a guilty plea. In re Personal Restraint of Francis, __ Wn.2d __, 242 P.3d 866, 869 (2010) ("the mere act of pleading guilty does not waive a double jeopardy challenge"); see also RCW 10.73.100 (exempting double jeopardy claims from the time limit for filing a personal restraint petition).

Legal errors stemming from a sentencing proceeding may be raised for the first time on appeal, even when they arise following a guilty plea where the defendant did not object to the offender score. State v. Wilson, _ Wn.2d _, 2010 WL 5187735, *3-4 (2010). Courts review such errors because a sentence based on a legal error "is a fundamental defect that inherently results in a miscarriage of justice." Id. at *3 (quoting In re Restraint of Goodwin, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002)). "A trial court only possesses the power to impose sentences provided by

law." In re Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Therefore, "[w]hen a sentence has been imposed for which there is no authority in law, the trial court has the Power and the duty to correct the erroneous sentence, when the error is discovered." Id. (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955)).

It is the imposition of punishment the triggers the double jeopardy violation, and a court lacks the authority to impose multiple punishments for offenses that violate double jeopardy. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). A double jeopardy violation is a manifest error affecting a constitutional right. Jackman, 165 Wn.2d at 746.

The State uses an inapplicable analogy from State v. Barbiero, 121 Wn.2d 48, 846 P.2d 519 (1993), as the linchpin of its argument. First, the State paints Barbiero as creating a *per se* bar precluding an appellate court from considering an issue raised in a second appeal when that issue could have been, but was not, raised in the first appeal. Barbiero does not so hold. In Barbiero, the court noted that an appellate court has discretion to consider issues that were not raised in a prior appeal. 121 Wn.2d at 51.

Second, Barbiero is inapt because it involves a challenge to the factors supporting an exceptional sentence where that sentence was not affected by a remand. The defendant in Barbiero received an exceptional sentence for two convictions. Id. at 49. In his first appeal, he did not raise any challenges to the exceptional sentence. Id. He won reversal of one of his convictions. Id. On remand, the trial court struck the reversed count but maintained the same exceptional sentence for the remaining count. Id. In his second appeal, Barbiero was precluded from challenging the sufficiency of the aggravating factors for the exceptional sentence when he had not challenged them during his first appeal, and the trial court had not altered its reasoning during the second sentencing proceeding.[2]

Unlike Barbiero, Mutch raises errors that occurred at the recent resentencing hearings which substantively altered the punishment imposed. In 2008, the court imposed an exceptional sentence for the first time, and the aggravating factor was Mutch's five convictions for second degree rape, which, when separately

---

[2] In Barbiero, the Court of Appeals decided the merits of several resentencing issues. 66 Wn.App. 902, 905, 833 P.2d 459 (1992), aff'd, 121 Wn.2d at 50. It refused to consider only the sufficiency of the aggravating factors that had neither been challenged in the first appeal nor affected by the

counted and multiplied by three points each, increased his criminal history score to leave some offenses "unpunished." CP 180-82.

Mutch's original sentence, that was reversed, rested on a single conviction for second degree rape. CP 84-85 (Dec. 16, 1994 Findings of Fact, Conclusion of Law 1). Only one current conviction was required for him to receive a sentence of life without the possibility of parole. Former RCW 9.94A.560 (1994). The court imposed a sentence of life without the possibility of parole in 1994 because it specifically concluded, "Richard Mutch has been convicted of three 'most serious offenses' on separate occasions." CP 84-85.[3] It crossed out language that Mutch had been convicted of "more than" three most serious offenses. Id. Thus, the original sentence was based on one of Mutch's current convictions, combined with two prior convictions, and not because of the multiplying effect of Mutch's current convictions.

Additionally, "[a]n error made a second time is still a new error." Magwood v. Patterson, __ U.S. __, 130 S.Ct. 2788, 2801, 177 L.Ed.2d 592 (2010). The State discounts Magwood as an

---

resentencing.

[3] The 1994 Judgment and Sentence shows that the court did not impose a consecutive sentence or an exceptional sentence. COA CP 5, 7.

irrelevant analysis of a federal statute.[4] But Magwood speaks to the identical legal principle at issue regarding whether Mutch may receive relief for a legal error that occurred in his case.

In Magwood, the defendant filed a second federal habeas petition after he had won a new sentencing hearing in his first habeas petition, but received the same sentence after remand. 130 S.Ct. at 2793-94. In his second petition, he claimed the State had not properly filed a death penalty notice, which is an issue he could have raised in his first petition. Id. at 2794. The Supreme Court held that when a new judgment is imposed, a petitioner may raise errors that affect the new judgment, even if he could have raised them in an earlier petition. Magwood, 130 S.Ct. at 2802.

Mutch is not using the accident of a remand to raise issues that he should not be allowed to raise. The court's resentencing, and its insistence that each of the five counts of rape required separate punishment warranting an exceptional sentence, made the error palpable to Mutch whereas it was meaningless under his

---

[4] Federal courts have not interpreted Magwood as a narrow reading of a particular statute that prosecution contends it represents. See Johnson v. United States, 623 F.3d 41, 46 (2nd Cir. 2010) (applying Magwood to habeas petition filed under different statute and concluding that, "[i]t follows [from Magwood] that, where a first habeas petition results in an amended judgment, a subsequent petition is not successive regardless of whether it challenges the conviction, the

prior sentence that would remain as life without parole no matter how may current convictions he had. CP 84-85. The double jeopardy error persists and Mutch may ask this Court for relief.

Additionally, RAP 2.5(c)(1) provides that where a case is again before the appellate court following a remand, "the appellate court may at the insistence of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case." The Rules of Appellate Procedure are interpreted liberally. RAP 1.2(a), (c). Double jeopardy is a fundamental legal principle strictly enforced by this Court.

The theory underlying the State's arguments is that in November 2008, the court simply imposed a sentence without exercising discretion and therefore nothing can be appealed. But this depiction of events is wrong. The court was required to exercise its discretion when imposing the exceptional sentence, otherwise the sentence would be invalid. State v. Parker, 132 Wn.2d 182, 190, 937 P.2d 575 (1997) ("We stress the SRA's requirement that the end sentence be the result of 'principled

---

sentence, or both.").

discretion.'"). When the judge relied, even in part, on an incorrect understanding of the standard sentencing range, upholding the sentence imposed "would defeat the purpose of the SRA." Id.

In July 2008, the court relied on a patently incorrect offender score as the predicate for determining that Mutch deserved an exceptional sentence. It counted Mutch's conviction for federal bank robbery as a prior offense, even though the error prompting the new sentencing proceeding was that this very offenses was not comparable. The State conceded the error, but rather then letting Mutch's appeal proceed, it swiftly sought another sentencing hearing.[5] The November 2008 resentencing was not a mere bureaucratic exercise, but was a substantive resentencing hearing at which the court was required to correctly calculate Mutch's offender score and determine from this lesser score whether Mutch's new offender score established the aggravating factor and substantial and compelling basis necessary for an exceptional sentence.

---

[5] The State conceded "the offender scores were miscalculated" and asked for remand to address the errors rather than direct review. Respondent's Answer to Statement of Grounds for Direct Review, p. 4.

The premise of the exceptional sentence was Mutch's multiple rape convictions. If these convictions violate double jeopardy, the court's exceptional sentence would be invalid. Consequently, the court's imposition of its sentence was necessarily based on its exercise of discretion, and Mutch is entitled to raise these constitutional errors where they undermine the validity of the punishment he received.

2. THE IMPOSITION OF MULTIPLE PUNISHMENTS BASED ON IDENTICALLY CHARGED OFFENSES WITHOUT A JURY FINDING THAT THE CONVICTIONS ARE SEPARATE AND DISTINCT VIOLATES DOUBLE JEOPARDY.

a. The prosecution distorts the burden of showing a double jeopardy violation. The prosecution presents a confused array of citations and uncited contentions to portray Mutch as bearing some extraordinary and insurmountable burden to show the jury's verdict necessarily violates double jeopardy. This argument turns established procedural rules and constitutional rights on their heads.

A double jeopardy error is a question of law that is reviewed *de novo*. Francis, 242 P.3d at 869. The same *de novo* analysis applies even if raised for the first time on appeal. Jackman, 156

Wn.2d at 746; State v. Adel, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998). The prosecution repeatedly asserts that Mutch must prove an identifiable, manifest error that actually prejudiced him. Response Brief, at 11-14. If there is a double jeopardy error, Mutch's exceptional sentence based on the multiplying effect of each conviction would demonstrate identifiable, manifest, prejudice.

When a double jeopardy violation occurs, there is no harmless error analysis. State v. Berg, 147 Wn.App. 923, 937, 198 P.3d 529 (2009). If the jury's verdict does not authorize the court to impose multiple punishments, the trial court exceeds its authority by imposing such punishment. See State v. Williams-Walker, 167 Wn.2d 889, 901-02, 225 P.3d 913 (2010). The "remedy for the double jeopardy violation is to vacate the additional identical count," without engaging in harmless error review, even when the error stems from inadequate jury instructions that render the basis of the jury's verdict unclear. Berg, 147 Wn.App. at 937.

The prosecution agrees Mutch did not invite a double jeopardy violation, but it cites at length from a case where the Court of Appeals concluded that the defendant invited a double jeopardy error by proposing the instructions at issue. Response Brief, at 13,

17-18.[6] Mutch did not propose instructions that invited the jury to rest its verdict on the same offense. Invited error analysis is irrelevant.

The prosecution asserts, without citation, that Mutch must demonstrate the jury's verdicts necessarily rested on a single act. Response at 15. That is not the standard.

When a jury's verdicts are ambiguous in the context of a double jeopardy violation, the rule of lenity requires the interpretation in favor of the defendant. State v. Kier, 164 Wn.2d 798, 814, 194 P.3d 212 (2008). In Kier, the prosecution relied on its closing argument to claim that the jury rested its verdicts for a robbery and assault on separate victims, and therefore the two convictions did not violate double jeopardy.

This Court applied the rule of lenity. Id. at 813-14. The jury instructions did not specify the victim, and both men were present during the incident, thus there was a "possibility" that the jury found the same man the victim of both offenses. Id. at 813. Notwithstanding the prosecutor's closing argument, in which he urged the jury to convict Kier of the two offenses based on

---

[6] See State v. Corbett, _ Wn.App. _ , 242 P.3d 52 (2010) ("Corbett actually proposed the very jury instructions on which he relies for his double

separate victims, "the jury instructions did not specify that Hudson alone was to be considered a victim of the robbery." Id.

A prosecutor's "election" cannot defeat a double jeopardy violation when the jury instructions do not mandate separate findings by the jury. Id. at 813-14; see Berg, 147 Wn.App. at 935-36. The instructions "allowed" the jury to base its verdict on the same victim, and the evidence did not preclude it, thus "the verdict here is ambiguous. The rule of lenity therefore requires the merger of Kier's second degree assault conviction into his first degree robbery conviction." Id. (internal citation omitted).

Similarly, if the jury's verdicts do not unambiguously authorize the court to impose separate punishment for each count, Mutch may raise the error and receive relief in this appeal.

b. The double jeopardy error is well-established, consistent with a litany of cases, and plainly evident from the record. The prosecution charged Mutch with five counts of the same offense during the same charging period. CP 137-39. The jury received identical instructions for each count. Instructions 15-

---

jeopardy argument. Accordingly, Corbett invited any error").

19 (COA CP 43-47). The jury was not told that each count must rest on separate and distinct acts.

This Court has never strayed from its holding that to insulate multiple convictions based on a single incident from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes a particular charged count in a criminal case. State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 1990 (1991) (affirming where to-convict instruction included, "in an incident separate from and in addition to any incident that may have been proved in count I."); cf State v. Watkins, 136 Wn.App. 240, 246, 148 P.3d 1112 (2006), rev. denied, 161 Wn.2d 1028 (2007) (noting unanimity instruction inadequate if instructions do not also require "separate act for each count").

On repeated occasions, the Court of Appeals has found the failure to clearly instruct the jury that each verdict for the same offense must rest on separate acts violates double jeopardy. State v. Carter, 156 Wn.App. 561, 568, 234 P.3d 275 (2010); Berg, 147 Wn.App. at 935; State v. Borsheim, 140 Wn.App. 357, 365, 165 P.3d 417 (2007); accord State v. Hayes, 81 Wn.App. 425, 431, 914 P.2d 78, rev. denied, 130 Wn.2d 1013 (1996) (affirming where court instructed jury that each conviction must rest on "an occasion

separate and distinct from" remaining counts); State v. Holland, 77 Wn.App. 420, 425, 891 P.2d 49, rev. denied, 127 Wn.2d 1008 (1995) (reversing two counts of child molestation where, "It is impossible, on this record, to conclude that all 12 jurors agreed on the same act to support convictions on each count.").[7]

The court did not instruct the jury that its verdict must rest on unanimous agreement of the underlying acts. Rather, the court told the jury a separate crime is charged in each count, and its verdict on one count should not control its verdict on another count. COA CP 53 (Instruction 25). The purpose of this instruction is to alleviate the prejudice attached to the jury hearing about multiple acts. 11 Wash. Practice, WPIC 3.01, Note on Use (3d. ed. 2008) (WPIC 3.01 may "guard against possible prejudice" where separate offenses tried together). Telling the jury that a separate crime is charged in each count does not direct the jury that it must unanimously agree on separate acts.

As the Court of Appeals said in Berg, "[t]he 'separate crime' instruction cannot save the jury instructions as a whole when they otherwise fail to convey the necessity of finding a 'separate and

---

[7] The prosecution misrepresents the result and holding in Holland. Response Brief at 13.

distinct' act for each count." See also Borsheim, 140 Wn.App. at 370 ("separate crime charged in each count" instruction insufficient on its own to convey different underlying event required); Watkins, 136 Wn.App. at 246 (instructing jury to agree on separate act does not tell jury to agree on same act for each count).

In State v. Ellis, 71 Wn.App. 400, 402, 406-07, 859 P.2d 632 (1993), the jury received the same "separate crime" instruction, but it alone was insufficient to adequately apprise the jury that its verdicts must rest on distinct acts. The trial court also instructed the jury in its "to convict" instruction for count II that the underlying act must have occurred "on a day other than count I." Id. at 402. The Ellis Court found this language, combined with a unanimity instruction that told the jurors they must unanimously agree on "at least one particular act . . . for each count," was sufficient to explain unanimity and double jeopardy. Id. at 402, 406-07. Yet the court in Ellis did not wholeheartedly endorse the court's instructions, instead saying they "marginally" conveyed the law adequately. Id. at 405.

Mutch's jury was not instructed that a "particular act" was required for each count, or that the underlying act must be based on a different occasion than the act in the other count. Moreover,

the jury was not instructed that a separate act must be the unanimious basis for each count.

c. The testimony and arguments do not rectify the double jeopardy violation. The prosecution's insistence that there were five "events" is incorrect. The complainant claimed she was required to repeatedly participate in oral and vaginal sex during the course of one night and early morning. RP 177-78, 181. Both oral or vaginal sex may separately qualify as an act of sexual intercourse under the statute. See State v. Tili, 139 Wn.2d 107, 119, 985 P.2d 365 (1999); RCW 9A.44.010(1). Thus, the jurors were presented with claims of more than five acts of sexual intercourse and needed to make choices about which acts occurred in order to render a verdict that reflects unanimous agreement of separate and distinct acts.

J.L.'s testimony on this point was short, as was the prosecutor's closing argument. RP 687, 689. J.L. described the events preceeding the first act of intercourse in great detail, but then summarily said the "same thing" happened four more times. RP 178. The defense pressed her about whether it really happened so many times, and also argued that the sexual relations were consensual. RP 274. The relationship between Mutch and

the complainant was consensual before this incident, and jurors could have found some of the events were consensual. In any event, the jury verdict was not a forgone conclusion.[8] The jurors needed to decide which acts of sexual intercourse occurred and base their verdicts on unanimous agreement of separate acts. The jury instructions did not clearly explain this requirement to the jury, and therefore, the multiple verdicts entered for multiple counts do not unambiguously show that the jury unanimously authorized punishment for separate and distinct offenses. See Kier, 164 Wn.2d at 813-14; Berg, 147 Wn.App. at 935.

d. Mutch is not challenging jury instructions. The prosecution asserts that Mutch is challenging the lack of an unanimity instruction, and this instructional error cannot be considered on appeal. However, even if Mutch had received a unanimity instruction, it may not have been adequate. In Carter and Berg, the jurors received unanimity instructions, but no instructions told the jurors that each count must be based on separate and distinct acts. Carter, 156 Wn.App. at 567; Berg, 147

---

[8] As Justice Scalia observed, analogously, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.". Crawford v. Washington, 541 U.S. 36, 62, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Wn.App. at 934. Without pointedly explaining that separate and distinct acts must be the basis of each, unanimously decided, count, a double jeopardy violation may occur. Id. No instruction conveyed to Mutch's jury that it must find separate and distinct acts for each count. The prosecution misrepresents the nature of the error in a misguided effort to counter Mutch's claims.

3. THE COURT CONSIDERED AND IMPERMISSIBLY REJECTED MUTCH'S REQUEST TO TREAT THE OFFENSES AS THE SAME CRIMINAL CONDUCT

Mutch represented himself at his November 2008 resentencing hearing. He told the court he wanted to address the proper offender score. 11/13/08RP 33. Noting that the laws in effect in 1994 would control, he said, "these cases encompass the same criminal conduct under RCW 9.94A.400(1)(a)." 11/13/08RP 34.

He asked for a jury trial on whether the separate convictions constituted the same criminal conduct. Id. He said, "if they [the convictions] encompass the same criminal conduct, you can only be given three points for the first degree rape and one point for the kidnapping which would give me a total score of four." Id. He explained that the sentencing guidelines manual indicated that the

court needed to decide whether the offenses were the same criminal conduct prior to sentencing. 11/13/08RP 36-37.

The prosecution understood and responded to Mutch's argument. It claimed that the offenses are "separate accounts" and "they would certainly count separately." 11/13/08RP 35. The prosecutor did not construe Mutch's objection as purely a legal argument that he wanted a further jury trial, instead, he understood Mutch was arguing that under former RCW 9.94A.400(1)(a), the convictions met the criteria for same criminal conduct. 11/13/08RP 35-36. The prosecutor insisted that "the offenses that we have set forth here count separately." 11/13/08RP 37. The court said it "understood" the State's position and entered findings that listed Mutch's offender score for the rape counts as 16, thus implicitly rejecting Mutch's request that the offenses be treated as the same criminal conduct. 11/13/08RP 37, 40-41; CP 181-82.

The prosecution asserts in its Response Brief that Mutch waived any same criminal conduct claim because he couched his claim, in part, on a request for a jury finding that the offenses were not the same criminal conduct. In fact, Mutch's request for a jury finding that the offenses were not the same criminal conduct accurately reflects the double jeopardy error discussed *supra*,

where the jury had not decided that five separate and distinct offenses occurred. Moreover, the prosecutor and sentencing judge understood Mutch's argument and rejected it without engaging in the required factual analysis.

The prosecution's efforts to distinguish the controlling same criminal conduct cases rest on a false representation of the facts. Supplemental Brief, 14-17. The complainant insisted that the "same thing" happened over and over and she never explained each repetition in detail. RP 177-80. She never described any break in the action where Mutch changed his strategy or reflected on his acts. Only once was there a break, where Mutch briefly slept and then asked for one more act of intercourse upon waking, and this intercourse "went by real fast." RP 181. The incidents need not be simultaneous to be part of a single, continuing impulse and qualify as the same criminal conduct.

The prosecution also insists that the final intercourse occurred in a separate room within J.L.'s apartment and therefore it cannot be construed as the same "place." The only case cited in support of this very specific and narrow definition of place is a case involving multiple firearms stored throughout a house. State v. Stockmyer, 136 Wn.App. 212, 220, 148 P.3d 1077 (2006). No

other case supports such a strict view of a place. On the contrary, the Court of Appeals found the same criminal conduct for manufacturing and possessing marijuana convictions, even though the State argued the manufacturing occurred in the basement, accessible only by an outside door, where the marijuana possession occurred in the kitchen. State v. Bickle, 153 Wn.App. 222, 230-31, 234, 222 P.3d 113 (2009). Rejecting the State's argument that "different place" means a different room, the court held, "Bickle's marijuana possession and manufacturing existed concurrently at the same time and place-2824 South Ainsworth in Tacoma." Id. at 234.

J.L. lived in a small apartment, with one bedroom, a living room, and a converted garage she used as an office or studio. RP 163-65, 171. There was a bed in the living room where J.L. told Mutch to sleep and where the intercourse occurred. RP 171. The State alleges that the final instance of intercourse occurred in J.L.'s studio, but the record does not clearly establish this location. J.L. testified that she went to her studio while Mutch was sleeping but did not testify that the intercourse occurred there. RP 180-81. Thus, even if separate rooms in a small apartment are different

places, the record does not establish that the offenses occurred in different rooms.

Mutch asked the court to impose a single sentence based on same criminal conduct. The court did not, even though it understood Mutch's argument. The court refused to apply same criminal conduct analysis without reviewing the underlying incident. The court's failure to meaningfully consider same criminal conduct is an abuse of discretion. The record shows that the five offenses were part of a single criminal impulse.

4. THE STATE CONCEDES THE TRIAL COURT'S WRITTEN FINDINGS ARE INCORRECT, AND THUS REMAND IS REQUIRED

a. The prosecution properly agrees that the trial court misunderstood Mutch's offender score even though it imposed an exceptional sentence based solely on this misunderstanding of the offender score. The prosecution agrees that the trial court's findings were "technically incorrect" when they stated the number of offenses that would go unpunished under a standard range sentence. Response Brief, at 42. Because the prosecution is certain it can convince the court to impose the same sentence anyway, it claims no resentencing is required.

In any sentencing case, accurately understanding the standard sentencing range is the necessary "starting point" that the judge "must understand" before imposing an exceptional sentence. Parker, 132 Wn.2d at 187. The court must understand and appreciate the standard set by the legislature before it can depart from it. Id. at 188.

Here, the court imposed an exceptional sentence based on the precise facts that it misunderstood. It claimed that a standard range sentence would only "punish" Mutch's convictions for "two counts of Rape in the Second Degree, and a non-violent felony." CP 182. However, if Mutch had been convicted of only two counts of rape and one non-violent felony, his offender score would have been "6." Since the standard range scoring chart includes offender scores at "9 or more," the court's belief that Mutch was at the maximum under the standard range when he was not, the court misapprehended the standard sentencing range. The trial court's findings of fact demonstrate that it misunderstood the very basis of the exceptional sentence imposed. This error requires reversal. Parker, 132 Wn.2d at 188.

A reviewing court may affirm an exceptional sentence when it invalidates one aggravating factor only when there are remaining,

validly imposed, aggravating factors. Response Brief, at 43 (citing State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003) ("Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing."); State v. Jennings, 106 Wn.App. 532, 543, 24 P.3d 430 (2001) (remanding where trial court specifically referred to the incorrect offender score)). Here, there was a single aggravating factor, not others that may independently justify the sentence imposed. Once this aggravating factor is stricken, the exceptional sentence may not stand.

b. The sentencing judge failed to engage in the mandatory analysis that substantial and compelling reasons justified the exceptional sentence. As explained in Mutch's supplemental brief, the court never found that there were substantial and compelling reasons for an exceptional sentence, which is a legislatively mandated predicate finding before the court may impose an exceptional sentence. RCW 9.94A.535; see Supplemental Brief, at 27-28.

The prosecution points to the prior sentencing hearing in July 2008, where the court orally mentioned that offenses would go substantially unpunished under the standard range and such a sentence would frustrate the purpose of the SRA. 7/28/08RP 47-48. Yet the court made this comment at a time that it misunderstood Mutch's offender score. In July 2008, the court was under the impression that the offender score was "20" and made its comments in that context. CP 23. The court's prior statement does not constitute a principled determination that substantial and compelling reasons support an exceptional sentence, when the remarks were made at a time the court misunderstood Mutch's offender score. See Parker, 132 Wn.2d at 188; RCW 9.94A.535.

c. The procedures set forth in RCW 9.94A.537 apply to any exceptional sentence above the standard range. The prosecution posits that the procedures set forth in RCW 9.94A.537 are entirely irrelevant to any exceptional sentence imposed based on judicial findings, as permitted by RCW 9.94A.535.

RCW 9.94A.537 and .535 work in conjunction, both addressing the procedures and substantive findings necessary for an exceptional sentence. Neither statute specifically excludes the application of the other. RCW 9.94A.537(1) says,

> At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

By its plain terms, it does not limit its application to certain types of aggravating factors. It does not exclude exceptional sentences sought by the prosecution when the prosecution wants the court to decide the aggravating factor. The prosecution offers no statutory analysis that would make RCW 9.94A.537 mean something other than its plain terms, and the plain terms of the statute provide that it applies to all exceptional sentences sought by the prosecution.

Finally, in a footnote at the end of its brief, the State asserts that it is free to seek an exceptional sentence under RCW 9.94A.589(1)(a), citing State v. Vance, 168 Wn.2d 754, 230 P.3d 1055 (2010). Response Brief at 47 n.25. RCW 9.94A.535 explicitly states that any sentence imposed under RCW 9.94A.589(1) "is an exceptional sentence subject to the limitations in this section." The court cannot impose consecutive sentences outside of the requirements for an exceptional sentence as set forth in RCW 9.94A.535 and RCW 9.94A.537. An exceptional sentence must rest on an aggravating factor and the prosecution

identifies none on which it could conceivably use for a valid exceptional sentence. Mutch should receive relief from his unlawful sentence forthwith.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Mutch respectfully requests this Court reverse the multiple convictions that violate double jeopardy and order that he receive a standard range sentence, which he has fully served.

DATED this 11th day of January 2011.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 82029-5
	)	
RICHARD MUTCH,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **APPELLANT'S REPLY TO STATE'S SUPPLEMENTAL BRIEF** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	DAVID MCEACHRAN, DPA HILARY THOMAS, DPA WHATCOM COUNTY PROSECUTOR'S OFFICE 311 GRAND AVENUE BELLINGHAM, WA 98225	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	RICHARD MUTCH 730230 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF JANUARY, 2011.

X_____

ORIGINAL

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711